

EXHIBIT 5

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18 ALSO PRESENT:
19 Akim Graham, Videographer
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1 Videotaped Deposition of ERNEST BAINBRIDGE
2 LIPSCOMB, III, ESQUIRE, held at the law offices of:
3
4 GOODWIN PROCTER, LLP
5 901 New York Avenue, Northwest
6 Washington, DC 20001
7 (202) 346-4000
8
9 Pursuant to Notice, before Joan V. Cain,
10 Court Reporter and Notary Public in and for the
11 District of Columbia.
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1	C O N T E N T S	
2		
3	EXAMINATION OF ERNEST B. LIPSCOMB, III	PAGE
4	By Mr. Strapp	6
5	By Mr. Graham	103
6		
7	E X H I B I T S	
8	(Attached to the Transcript.)	
9	LIPSCOMB DEPOSITION EXHIBITS	PAGE
10	Exh. 1 Rebuttal Expert Report of Ernest B.	12
11	Lipscomb, III	
12	Exh. 2 Gartner Research Publication Paper,	64
13	Bates No'd ePlus 0940869 through '871	
14	Exh. 3 ComputerWorld Article Entitled EPlus	67
15	Charges SAP with Patent Infringement,	
16	Bates No'd ePlus 940878	
17		
18		
19		
20		
21		
22		

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1 reexamination proceeding have the same evidentiary 2 burden of clear and convincing evidence that Lawson 3 would to present -- in presenting invalidity to show 4 a basis for rejection?		1 be years ago that if you didn't rely on your opinion 2 of counsel, then you were very likely to be held to 3 be willful -- a willful infringer. I think Seagate 4 sort of overturned that, that willfulness was not 5 predicated on opinion from counsel.	
5 A The examiner doesn't have a standard of 6 clear and convincing. He just applies the 7 references. It's an obviousness standard or 8 anticipation or whatever.		6 Q But you would agree that if a party is 7 going to invoke the opinion of counsel as a sword, 8 so to speak, it cannot withhold that opinion of 9 counsel by refusing to waive the attorney-client 10 privilege?	
9 Q Do you want to take a break for a few 10 minutes?		11 A I would agree with that.	
11 MR. GRAHAM: Sure.		12 Q Could you turn to paragraph 30 of your 13 report on page 15, please. Now, you had mentioned 14 earlier today that the opinion of counsel can be one 15 of the factors in the totality of factors test to --	
12 THE VIDEOGRAPHER: Going off the record. 13 The time is 10:43 a.m.		16 A Yes.	
14 (Recess.)		17 Q -- determine whether a party was 18 objectively reckless in continuing to practice -- or 19 continuing to use products accused of infringement, 20 correct?	
15 THE VIDEOGRAPHER: Back on the record. The 16 time is 10:47 a.m.		21 A Yes.	
17 BY MR. STRAPP:		22 Q And are you specifically opining in this	
18 Q Mr. Lipscomb, we were talking about Seagate 19 technology and the standard that it was set -- 20 that's set for willfulness in that case. Is it your 21 understanding that the standard for willfulness 22 announced in the Seagate case in 2007 is the current			
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1 applicable standard for willfulness?		1 instan- -- in this case that Lawson's opinion of 2 counsel was one of the factors that you were relying 3 upon in reaching your conclusion that Lawson was not 4 objectively reckless in continuing to prac -- 5 continuing to use the products accused of 6 infringement?	
2 A Yes.		7 A Yes.	
3 Q Are you familiar with the portion of 4 Seagate that discusses the issue of waiver of the 5 attorney-client privilege with respect to opinion 6 counsel and trial counsel?		8 Q When did Lawson obtain the opinion of 9 counsel that you are aware of?	
7 A I read the entire case, but I don't really 8 remember the specifics of that part.		10 A It's my understanding that they obtained 11 opinion of counsel shortly after suit was filed.	
9 Q Well, let me ask you generally. Are you -- 10 are you familiar with the principle that a party is 11 not allowed to use the attorney-client privilege as 12 both a sword and shield with respect to opinions of 13 counsel?		12 Q And who drafted that opinion of counsel?	
14 A I would agree with that.		13 A I have no idea. I didn't.	
15 Q So would you agree then also that a party 16 cannot use its opinion of counsel simultaneously to 17 gain an advantage while invoking the privilege to 18 prevent the other party from reviewing portions of 19 the opinion of counsel?		14 Q And what did the opinion of counsel say?	
20 A My understanding is that that the current 21 law from Seagate is that you do not have to provide 22 opinions of counsel, and that does not -- it used to		15 MR. GRAHAM: Objection, foundation.	
		16 THE WITNESS: I have no idea. Never read 17 the opinion.	
		18 BY MR. STRAPP:	
		19 Q Do you know who wrote the opinion?	
		20 A You just asked me that.	
		21 Q I did. You're right.	
		22 A See, I listen. I try to.	

<p>1 Q You don't know who wrote the opinion and 2 you don't know what the opinion said. Do you know 3 anything at all about the contents of the opinion? 4 A No. 5 Q Who informed you that there was an opinion 6 of counsel? 7 A It was either Kristin -- Kirstin or Peter 8 Gergely. 9 Q So they told you there's an opinion of 10 counsel but they didn't tell you who wrote the 11 opinion -- 12 A No. 13 Q -- or what it contained? 14 A That's correct. 15 Q But they did tell you that it was received 16 after litigation began? 17 A That's correct. 18 Q Now, how is it that an opinion of counsel 19 about which you have no knowledge at all can be, in 20 your opinion, one of the bases for a finding that 21 Lawson was not objectively reckless here? 22 A An opinion of counsel, presumptively it's</p>	<p>49 1 one way or the other about whether this opinion of 2 counsel found that Lawson was infringing or not 3 infringing the products -- the patents, correct? 4 MR. GRAHAM: Object. Objection, asked and 5 answered. 6 THE WITNESS: I have no knowledge of what 7 the opinion says one way or the other. I just 8 cannot conceive of counsel writing an opinion and 9 saying guys, you're infringing. Stop. 10 BY MR. STRAPP: 11 Q Well, wouldn't you ask to see the opinion 12 of counsel if it was going to form part of the basis 13 of your opinion that there wasn't objectively 14 reckless -- that -- that Lawson didn't act 15 objectively reckless here? 16 A I missed the first part of that question. 17 Q Wouldn't it make sense, in your opinion, to 18 ask Merchant & Gould for a copy of the opinion of 19 counsel to actually read it before you -- before you 20 reached the conclusion that that opinion of counsel 21 could be a basis for finding that Lawson was not 22 objectively reckless?</p>
<p>50 1 the opinion of counsel is that it's either invalid 2 or no infringement, presumptively, and that being 3 the case, it certainly would be a factor. 4 Q Well, you say presumptively the opinion of 5 counsel is either invalid or no infringement, but 6 you don't know -- you don't know that, right? 7 A I've been doing this for almost 45 years 8 and I've never seen an opinion of counsel that says, 9 guys, we're infringing and the patent's valid, so we 10 better stop. 11 Q So you assume that when someone gets an 12 opinion of counsel, it's going to say what they want 13 it to say? 14 A No. I assume that it's going to say what 15 counsel believes, what his opinion is in the case. 16 Q And you assume that his opinion is going to 17 be what the Merchant & Gould attorneys wanted it to 18 be? 19 A I don't know whether Merchant & Gould is 20 involved with that opinion or not, so I don't -- I 21 don't know how to answer that. 22 Q Okay. But you have absolutely no knowledge</p>	<p>50 52 1 A I would say that opinions of counsel always 2 can be, assuming they don't say, guys, stop, would 3 be a factor. 4 Q So wouldn't it make sense for you to look 5 at the opinion of counsel to make sure that it 6 doesn't say, guys, stop? 7 A Not necessarily. 8 Q Why not? 9 A Why? 10 Q Because you don't know what it says. 11 A I presume what it says in the sense that it 12 doesn't say, you know, guys, you need to stop. I 13 mean, nobody does that. 14 Q Well, why didn't you ask -- if you're not 15 going to ask to actually see it, why didn't you ask 16 the Merchant & Gould attorneys what it said? 17 A Well, there wasn't any reason to because 18 it's -- it's still a factor. It is a factor. It 19 can be -- if it says, guys, you're infringing, stop, 20 that's a factor also. 21 Q Correct. 22 A That's all.</p>